

United States
7
Circuit Court of Appeals
For the Ninth Circuit.

J. MONTELATICI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

FILED

APR 19 1923

F. D. MONKTON,
CLERK.

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Circuit Court of Appeals
For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Arraignment	9
Assignments of Error	31
Bail Bond on Writ of Error.....	37
Bench Warrant	4
Bill of Exceptions for Defendant, J. Montelatici	47
Certificate of Clerk U. S. District Court to Transcript of Record.....	83
Citation to Writ of Error.....	86
Cost Bond on Writ of Error.....	39
Indictment for Violation of the National Prohibition Act	1
Instructions of Court to the Jury.....	67
Judgment (A. Lazzari).....	21
Judgment (J. Montelatici).....	28
Judgment Ordered as to Defendant A. Lazzari and Continuing Sentence as to Defendant J. Montelatici	14
Judgment Ordered as to Defendant Montelatici.	17
Minutes of Court—May 12, 1922—Order for Capias Issued	8
Minutes of Court—May 15, 1922—Arraignment.	9
Minutes of Court—May 27, 1922—Order Setting Date of Trial.....	9

Index.	Page
Minutes of Court—July 24, 1922—Order Setting Date of Trial	10
Minutes of Court—November 20, 1922—Order Setting Date of Trial.....	10
Minutes of Court—November 24, 1922—Trial..	11
Minutes of Court—November 25, 1922—Trial (Continued)	12
Minutes of Court—December 1, 1922—Judg- ment Ordered as to Defendant A. Lazzari and Continuing Sentence as to Defendant J. Montelatici	14
Minutes of Court—December 9, 1922—Order Continuing Passing of Sentence.....	15
Minutes of Court—December 13, 1922—Order Denying Motion for New Trial.....	16
Minutes of Court—January 12, 1923—Judg- ment Ordered as to Defendant J. Monte- latiçi	17
Minutes of Court—February 3, 1923—Order That Writ of Error Issue.....	18
Minutes of Court—February 5, 1923—Order Continuing Hearing on Motion.....	18
Minutes of Court—February 6, 1923—Order Denying Motion to Vacate Judgment.....	19
Minutes of Court—February 26, 1923—Order Continuing Time to and Including March 24, 1923, to File Proposed Bill of Excep- tions and Record on Appeal.....	20
Minutes of Court—March 23, 1923—Order Al- lowing Bill of Exceptions.....	21
Motion in Arrest of Judgment by J. Monte- latiçi	23

Index.	Page
Motion of J. Montelatici for a New Trial.....	25
Motion to Vacate Judgment	30
Names and Addresses of Attorneys of Record.	1
Order Allowing Bill of Exceptions.....	21
Order Allowing Writ of Error.....	36
Order Continuing Hearing on Motion.....	18
Order Continuing Passing of Sentence.....	15
Order Continuing Time to and Including March 24, 1923, to File Proposed Bill of Exceptions and Record on Appeal.....	20
Order Denying Motion for New Trial.....	16
Order Denying Motion to Vacate Judgment..	19
Order Extending Time to File Record and Docket Cause (Dated March 24, 1923)....	82
Order for Capias Issued	8
Order Setting Date of Trial.....	9
Order That Writ of Error Issue.....	18
Petition for Writ of Error.....	34
Praecipe for Transcript of Record.....	45
Stipulation Fixing Time for Filing Proposed Bill of Exceptions (Dated February 24, 1923)	42
Stipulation Fixing Time for Filing Proposed Bill of Exceptions (Dated March 8, 1923).	43
Stipulation Fixing Time for Filing Proposed Bill of Exceptions (Dated March 20, 1923).	44
TESTIMONY ON BEHALF OF THE GOV- ERNMENT:	
BROWN, H. P.	59
Cross-examination	61
DINSMORE, S. C.	56

Index.	Page
TESTIMONY ON BEHALF OF THE GOVERNMENT—Continued:	
DUBOIS, P. E.	57
Cross-examination	59
NASH, P.	47
Cross-examination	49
SCOTT, THOMAS	49
Cross-examination	52
Redirect Examination	55
TESTIMONY ON BEHALF OF DEFENDANTS:	
LAZARRI, A.	61
MONTELATICI, J.	64
Cross-examination	65
Redirect Examination	65
Recross-examination	66
Trial	11
Trial (Continued)	12
Verdict (A. Lazzari)	8
Verdict (J. Montelatici)	7
Withdrawal of Counsel ..	27
Writ of Error	84

Names and Addresses of Attorneys of Record.

Mr. M. M. DETCH, Reno, Nevada,
For the Plaintiff in Error.

Honorable GEORGE SPRINGMEYER, United
States Attorney for the District of Nevada,
Reno, Nevada, and Honorable C. A. CANT-
WELL, Assistant United States Attorney for
the District of Nevada, Reno, Nevada,
For the Defendant in Error. [1*]

In the District Court of the United States, in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,
Defendants.

**Indictment for Violation of the National Prohibi-
tion Act.**

United States of America,
District of Nevada,—ss.

Of the May Term of the District Court of the
United States of America, in and for the District
of Nevada, in the year of our Lord one thousand
nine hundred and twenty-two:

The Grand Jurors of the United States of
America, chosen, selected and sworn, within and

*Page-number appearing at foot of page of original certified Tran-
script of Record.

for the District of Nevada, in the name and by the authority of the United States of America, upon their oaths do find and present:

That J. Montelatici and A. Lazzari, hereinafter called the defendants, heretofore, to wit, on or about the 3d day of May, A. D. 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indictment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly have in their possession [2] intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, and being fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

SECOND COUNT.

That J. Montelatici and A. Lazzari, hereinafter called the defendants, heretofore, to wit, on or about the 3d day of May A. D. 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indict-

ment, in violation of Section 3, Title II, of the Act of Congress dated October 28, 1919, known as "The National Prohibition Act," did unlawfully, wilfully and knowingly sell intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, and being fit for use for beverage purposes.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

THIRD COUNT.

That J. Montelatici and A. Lazzari, hereinafter called the defendants, heretofore, to wit, on or about the 3d day of May, A. D. 1922, at Reno, Washoe County, State and [3] District of Nevada, and within the jurisdiction of this Court, after the date upon which the 18th Amendment to the Constitution of the United States of America went into effect and before the finding of this indictment, in violation of Section 21, Title II, of the Act of Congress dated October 28, 1919, known as the "National Prohibition Act," did unlawfully, wilfully and knowingly maintain a common nuisance, in that the said defendants did unlawfully, wilfully and knowingly keep in that certain building situate at number 246 Lake Street in the City of Reno, County of Washoe, State and District of Nevada, known as and called the "New Tuscano Hotel," intoxicating liquor for sale; said liquor containing one-half of one per cent, or more of

alcohol by volume, and being fit for use for beverage purpose.

CONTRARY to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

GEORGE SPRINGMEYER,
United States Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment: P. Nash.

[Endorsed]: No. 5495. United States District Court, District of Nevada. The United States vs. J. Montelatici and A. Lazzari Indictment for Violation of the National Prohibition Act. A true bill. W. P. Harrington, Foreman. Filed in open court this 12th day of May, A. D. 1922. E. O. Patterson, Clerk. Dec. 1, Lazzari 5 months—\$350.00 and costs. Jany. 12, Montelatici, 4 months and costs. [4]

Bench Warrant.

UNITED STATES OF AMERICA,
District of Nevada.

To the Marshal of the United States for the District of Nevada, and to His Deputies and Any or Either of Them, GREETING:

WHEREAS, at a District Court of the United States of America, begun and held at Carson City, Nevada, within and for the District aforesaid, on the 1st day of May, 1922, the Grand Jurors in and

for said District brought into said court a true bill of indictment against J. Montelatici and A. Lazzari, charging them with the crime of having on or about May 3d, 1922, at Reno, in the county of Washoe, District of Nevada, violated the National Prohibition Act by unlawfully, wilfully and knowingly having in their possession intoxicating liquor containing one-half of one per cent or more, of alcohol by volume, fit for use for beverage purposes; unlawfully, wilfully and knowingly selling intoxicating liquor; and maintaining a common nuisance in that they kept for sale intoxicating liquor in that certain building situate at 246 Lake Street, City of Reno, State and District of Nevada, known as and called the "New Tuscano Hotel," as by said indictment now remaining on file and of record in said Court more fully appears, to which indictment the said J. Montelatici and A. Lazzari hath not yet appeared or pleaded.

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, in the name of the President of the United States, to apprehend the said J. Montelatici and A. Lazzari, and bring them before said Court in Carson City, Nevada, to answer unto said indictment May 15, 1922, or, if — requires it that you take — before the Judge of said Court, or any United States Commissioner in said District, that — may give bail in the sum of — present bail sufficient to answer said indictment.

WITNESS, the Honorable E. S. FARRINGTON, Judge of said District Court, and the seal

thereof hereunto affixed, at Carson City, Nevada,
this 12th day of May, 1922.

[Seal]

Attest: E. O. PATTERSON,
Clerk.

By O. E. Benham,
Deputy.

GEORGE SPRINGMEYER,
U. S. Attorney. [5]

MARSHAL'S RETURN.

Executed the within Bench Warrant on the
within named defendants, at Carson City, Nevada.
on the 15th day of May, 1922, and I now have
them before the U. S. District Court at Carson
City, Nevada, this 15th day of May, 1922.

J. H. FULMER,
U. S. Marshal.

By J. P. Fodrin,
Deputy.

[Endorsed]: No. 5495. United States District
Court, District of Nevada. The United States vs.
J. Montelatici and A. Lazzari. Bench Warrant.
Filed on return this 20th day of May, 1922. E. O.
Patterson, Clerk. By O. E. Benham, Deputy Clerk.
Criminal Docket No. 3414.

In the District Court of the United States for the
District of Nevada.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Verdict (J. Montelatici).

We, the jury in the above-entitled case, find the defendant, J. Montelatici, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,

Foreman.

[Endorsed]: No. 5495. U. S. District Court, District of Nevada. The United States vs. J. Montelatici and A. Lazzari. Verdict. Filed this 25th day of Nov., 1922. E. O. Patterson, Clerk.

In the District Court of the United States for the
District of Nevada.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Verdict (A. Lazzari).

We, the jury in the above-entitled case, find the defendant, A. Lazzari, guilty as charged in the first count of the indictment; guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,
Foreman.

[Endorsed]: No. 5495. U. S. District Court, District of Nevada. The United States vs. J. Montelatici and A. Lazzari. Verdict. Filed this 25th day of Nov., 1922. E. O. Patterson, Clerk. [6]

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Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—May 12, 1922—Order for Capias Issued.

The Grand Jury impaneled in and by this Court having this day presented a true bill of indictment in this case, IT IS ORDERED that a capias issue herein returnable Monday, May 15th, 1922, at ten o'clock A. M.; and IT IS FURTHER ORDERED that the present bond of the said defendants be,

and they are hereby, considered sufficient and remain the same.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—May 15, 1922—Arraignment.

These defendants appeared this day with their attorney, Mr. F. Raffetto and were thereupon duly arraigned on the indictment as required by law. They each declared their true name to be as stated in the indictment and entered pleas of not guilty thereto. [7]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—May 27, 1922—Order Setting
Date of Trial.**

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that

this case be, and the same is hereby, set down for trial on July 5, 1922, to follow case No 5488.

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—July 24, 1922—Order Setting Date of Trial.

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that this case be, and the same is hereby, set down for trial on August 15, 1922, to follow case No. 5488.

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—November 20, 1922—Order Setting Date of Trial.

Upon motion of Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that

this case be, and the same is hereby, set down for trial on November 23, 1922, at ten o'clock A. M.
[8]

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—November 24, 1922—Trial.

This cause coming on regularly for trial this day, Mr. C. A. Cantwell, Assistant United States Attorney, appeared for and on behalf of the plaintiff; Messrs. Frame & Raffetto for the defendants,—the defendants being personally present. The following named jurors were accepted by the parties and duly sworn to try the issue, viz: Thomas Rowe, A. B. Dickinson, Fritz Behrman, Charles Miller, L. Radcliffe, Benjamin Barbash, M. Jacobsen, Fred Allerman, C. F. Stock, Herbert Maxson, Howard Sullivan and Charles A. Brulin. At 4:30 P. M. the jury was admonished by the Court not to talk among themselves about the case, nor to allow others to talk to them about it or in their presence concerning it and to refrain from making up their minds as to what their verdict would be until the case was finally submitted to them and they were excused until ten o'clock to-morrow morning.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A LAZZARI.

**Minutes of Court—November 25, 1922—Trial (Con-
tinued).**

The same counsel, the defendants and the jury being present the further trial of this case was resumed this day. The clerk read the Indictment to the jury and stated the pleas of the defendants. Upon motion of Mr. Frame plaintiff's witnesses were marshalled, duly sworn and placed under the rule, viz: P Nash, H. P. Brown, Thomas Scott, M. K. Toohey and P. E. DuBois; defendant's counsel stated that defendants had no witnesses. Mr. P. Nash called and testified on behalf of plaintiff and during his testimony plaintiff's counsel had the witness draw and testify from a sketch upon the blackboard, same representing the "New Tuscano Hotel." Mr. Cantwell had marked a five dollar silver certificate (corner torn off) numbered M97605810, sealed in an envelope, marked Plffs. Ex. No. 1 for Identification. Thomas Scott called by plaintiff and during his testimony Mr. Cantwell had marked one pint bottle about one-half full light liquor, Plffs. Ex. No. 2 for Identification. Mr. Cantwell offered for all purposes Plffs. Ex. No. 1,

ordered admitted and marked Plffs. Ex. No. 1. Mr. S. C. Dinsmore duly sworn and testified for plaintiff. Thereafter plaintiff's witnesses P. E. DuBois, H. P. Brown and M. K. Toohey were each called in turn and testified for plaintiff. Thereupon plaintiff rests. The defendants, A. Lazzari and J. Montelatici were each duly sworn and testified in their own behalf after which defendant rests. No further testimony [9] being offered and after argument by counsel for the respective parties the case was submitted. Thereupon and after hearing the instructions given by the Court the jury retired in charge of the Marshal to deliberate on the case and at 4:55 came into court with the following verdict, viz: "In the District Court of the United States for the District of Nevada. The United States vs. J. Montelatici and A. Lazzari. No. 5495. We, the jury in the above-entitled case, find the defendant, J. Montelatici, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; and guilty as charged in the third count. Dated this 25th day of November, 1922, H. B. Maxson, Foreman." "In the District Court of the United States for the District of Nevada. The United States vs. J. Montelatici and A. Lazzari. No. 5495. We, the jury in the above-entitled case, find the defendant A. Lazzari, guilty as charged in the first count of the indictment; guilty as charged in the second count; and guilty as charged in the third count. Dated this 25th day of November, 1922. H. B. Maxson, Foreman,"—and so they all say. IT IS OR-

DERED that these defendants appear Monday, December 1, 1922, at ten o'clock A. M., for sentence. Ordered that the jury be, and it is hereby excused until Monday, November 27, 1922, at ten o'clock A. M. Upon motion of Mr. Frame the bail of these defendants is hereby fixed at Two Thousand (\$2,000.00) Dollars cash for each.

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—December 1, 1922—Judgment
Ordered as to Defendant A. Lazzari and Continuing Sentence as to Defendant J. Montelatici.**

Upon motion of Mr. James M. Frame, consent thereto being given by Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the time for passing sentence upon the defendant J. Montelatici be, and the same is hereby, continued to and until December 9th, 1922, at ten o'clock A. M. This being the time heretofore fixed for passing sentence upon the defendant A. Lazzari the Court pronounced judgment as follows, addressing the said defendant. In consideration of the law and the premises, IT IS HEREBY OR-

DERED AND ADJUDGED that you be imprisoned in the county jail of Washoe County, Nevada, for the period of five (5) months from and after this date and that you pay to the United States a fine in the sum of Three Hundred Fifty (\$350.00) Dollars and that you stand committed in said county jail until the said fine together with the costs herein incurred are paid. [10]

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—December 9, 1922—Order Continuing Passing of Sentence.

This being the time heretofore appointed for passing sentence in this case, the defendants appeared with their attorney, Mr. James M. Frame and presented his motion for a new trial and a motion in arrest of judgment. Mr. C. A. Cantwell, Assistant United States Attorney, appeared for and on behalf of plaintiff. The motions were argued by counsel for the respective parties and by the Court taken under advisement and IT IS ORDERED that the time for passing sentence in this case upon the defendant J. Montelatici be and the same is hereby continued to and until January 13, 1923, at ten o'clock A. M.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—December 13, 1922—Order Denying Motion for New Trial.

This being the time heretofore fixed for passing sentence upon the defendant J. Montelatici and he being now present in court with his attorney, Mr. James M. Frame; Mr. Frame presents and files his motion for a new trial upon which IT IS ORDERED that defendant's motion for a new trial be, and the same is hereby, denied, and the said defendant will be allowed to and including January 12th, 1923, within which to perfect and file his papers on appeal. [11]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—January 12, 1923—Judgment
Ordered as to Defendant J. Montelatici.**

This being the time heretofore fixed for passing sentence upon the defendant J. Montelatici, he appeared with his attorney Mr. M. M. Detch. Upon motion of Mr. Detch and upon the heretofore filed withdrawal of Messrs. Frame & Raffetto, IT IS ORDERED that the name of Mr. M. M. Detch be, and the same is hereby, entered as of record as attorney for the defendant in this case. Thereupon the Court pronounced judgment as follows, addressing the defendant J. Montelatici. In consideration of the law and the premises, IT IS HEREBY ORDERED AND ADJUDGED that you be imprisoned in the county jail of Washoe County, Nevada, for the period of four (4) months from and after this date and that you stand committed in said county jail until the costs herein are paid by you. To this sentence Mr. Detch asked and was granted the benefit of an exception. Upon motion of Mr. Detch, IT IS ORDERED that the bond of this defendant be, and the same is hereby, fixed at Three *Thousand* (\$3,000.00) *cash*, or \$4,000.00 surety to act as a supersedeas bond upon appeal and to cover any order of this Court. IT IS FURTHER ORDERED THAT THE DEFENDANT HAVE FIFTEEN days from and after this date within which to furnish said bond and in the meantime the Two Thousand (\$2,000.00) Dollars cash bond will be surety for the filing of the required bond. [12]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

G. MONTELATICI and A. LAZZARI.

**Minutes of Court—February 3, 1923—Order that
Writ of Error Issue.**

Upon the filing by defendant's attorney, Mr. M. M. Detch, of his assignment of error, cost bond, supersedeas bond and petition for writ of error, IT IS ORDERED that a writ of error issue in this case.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—February 5, 1923—Order Con-
tinuing Hearing on Motion.**

Upon motion of Mr. M. M. Detch, attorney for these defendants, consent thereto being given by Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the hearing on the motion of defendant, J. Montelatici, to modify

the judgment on account of the inconsistency of the verdict be, and the same is hereby, continued to and until to-morrow at ten o'clock A. M. [13]

Indictment for Violation of National Prohibition Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

Minutes of Court—February 6, 1923—Order Denying Motion to Vacate Judgment.

These defendants appeared this day with their attorney, Mr. M. M. Detch, and their motion to vacate judgment was argued, submitted and ordered overruled. IT IS FURTHER ORDERED that the papers on appeal submitted to the Court on the 3d day of February, 1923, on behalf of the defendant J. Montelatici be and the same are hereby filed as of that date. IT IS FURTHER ORDERED that the said defendant, J. Montelatici be, and he is hereby, granted to and until February 26, 1923, within which to file his bill of exceptions. [14]

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—February 26, 1923—Order Con-
tinuing Time to and Including March 24, 1923,
to File Proposed Bill of Exceptions and Record
on Appeal.**

Upon stipulation by counsel for the respective parties, IT IS ORDERED that the defendant, J. Montelatici be, and he is hereby, allowed to and until March 10th, 1923, within which to file proposed bill of exceptions, and IT IS FURTHER ORDERED that defendant be, and he is hereby, allowed to and until March 24th, 1923, within which to file record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Indictment for Violation of National Prohibition
Act.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZZARI.

**Minutes of Court—March 23, 1923—Order Allow-
ing Bill of Exceptions.**

On motion of Mr. M. M. Detch, attorney for defendant J. Montelatici, and consent thereto being given by Mr. C. A. Cantwell, Assistant United States Attorney, IT IS ORDERED that the bill of exceptions be, and the same is hereby, settled and allowed. [15]

In the District Court of the United States for the
District of Nevada.

Honorable E. S. FARRINGTON, Judge.

October Term, 1922.

Violation National Prohibition Act.

No. 5495.

UNITED STATES OF AMERICA

vs.

J. MONTELATICI and A. LAZZARI.

Judgment (A. Lazzari).

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressing the defendant:

You, A. Lazzari, have been indicted by the Grand Jury, impaneled in and by this Court for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one-half of one per cent or more, of alcohol by volume,

fit for use for beverage purposes; unlawfully, wilfully and knowingly selling intoxicating liquor; and unlawfully, wilfully and knowingly maintaining a common nuisance by keeping intoxicating liquor for sale in that certain building situate at 246 Lake Street in the City of Reno, Nevada; said crime having been committed on the 3d day of May, 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ordered and adjudged that you be imprisoned in the county jail of Washoe County, Nevada, for the period of Five (5) Months from and after this date and pay to the United States a fine of Three Hundred Fifty (\$350.00) Dollars, and that you stand committed in said county jail until the fine and costs, taxed at \$63.40, are paid.

Dated and entered Dec. 1, 1922.

Attest: E. O. PATTERSON,

Clerk.

By O. E. Benham,

Deputy. [16]

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZ-
ZARO,

Defendants.

Motion in Arrest of Judgment by J. Montelatici.

Comes now J. Montelatici, one of the defendants above named and moves the Court to arrest the judgment and that no judgment be rendered upon the verdict against him, finding him guilty of maintaining a nuisance by keeping for sale intoxicating liquors, upon the following grounds, to wit:

1.

That the verdict is insufficient to support a judgment.

2.

That said verdict is inconsistent and will not support a judgment in this: That upon the same trial and as a part of the verdict rendered by the jury in the above-entitled cause, the jury returned a verdict of not guilty as to this defendant, for sales of liquor and the possession of liquor, on the same date and upon the same transaction upon which a verdict of guilty of maintaining a nuisance, that is keeping intoxicating liquor for sale, was based. All of which is inconsistent with the verdict of

guilty of maintaining a nuisance rendered by the jury.

3.

That the count of the indictment charging the defendant with maintaining a nuisance, does not state facts sufficient [17] to constitute a public offense or any offense whatsoever, under the laws of the United States, and is not sufficient in law.

4.

That upon the whole record the judgment is erroneous and should not be rendered.

J. M. FRAME and
F. RAFFETTO,

Attorneys for the Defendant, J. Montelatici.

[Endorsed]: No. 5495. In the District Court of the United States, Within and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Amatraddo Lazzaro, Defendants. Motion in Arrest of Judgment by J. Montelatici. Service admitted by copy this 5th day of December, 1922. George Springmeyer, U. S. District Attorney. J. M. Frame and F. Raffetto, Attorneys for Defendants. Filed Dec. 6, 1922. E. O. Patterson, Clerk. [18]

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZ-
ZARO,

Defendants.

Motion of J. Montelatici for a New Trial.

Comes now J. Montelatici, one of the defendants above named, and moves the Court to set aside the verdict of the jury heretofore rendered against him in the above-styled cause, finding him guilty of maintaining a nuisance by keeping intoxicating liquors for sale upon the following grounds, to wit:

1.

That said verdict is contrary to law.

2.

That said verdict is contrary to the evidence.

3.

That said verdict is contrary to the law and the evidence.

4.

That said verdict is inconsistent and will not support a judgment in this: That upon the same trial and as a part of the verdict rendered by the jury in the above-entitled cause, the jury returned a verdict of not guilty as to this defendant, for sales of liquor and the possession of liquor, on the same date and upon the same transaction upon

which a verdict of guilty [19] of maintaining a nuisance, that is keeping intoxicating liquor for sale, was based. All of which is inconsistent with the verdict of guilty of maintaining a nuisance rendered by the jury.

5.

Misdirections of the jury as to matters of law.

6.

Error of the Court in admitting and rejecting testimony.

7.

That the evidence is insufficient to support the verdict.

J. M. FRAME and
F. RAFFETTO,

Attorneys for Defendant J. Montelatici.

[Endorsed]: No. 5495. In the District Court of the United States, Within and for the District of Nevada. United States of America, Plaintiff, vs J. Montelatici and Amatraddo Lazzaro, Defendants. Motion of J. Montelatici for a New Trial. Service admitted by copy this 5th day of December, 1922. George Springmeyer, U. S. District Attorney. J. M. Frame and F. Raffetto, Attorneys for Defendants. Filed Dec. 6, 1922. E. O. Patterson, Clerk. [20]

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZZARO,

Defendants.

Withdrawal of Counsel.

Come now J. M. Frame and F. Raffetto and hereby withdraw as attorneys of record in the above entitled cause.

J. M. FRAME.

F. RAFFETTO.

[Endorsed]: No. 5495. In the District Court of the United States, Within and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Amatraddo Lazzaro, Defendants. Withdrawal. Filed Jany. 10, 1923. E. O. Patterson, Clerk. [21]

In the District Court of the United States for the
District of Nevada.

Honorable E. S. FARRINGTON, Judge.

October Term, 1922.

No. 5495.

Violation National Prohibition Act.

UNITED STATES OF AMERICA

vs.

J. MONTELATICI and A. LAZZARI.

Judgment (J. Montelatici).

This being the time heretofore appointed for passing sentence in this case the Court pronounced judgment as follows, addressing the defendant:

You, J. Montelatici, have been indicted by the Grand Jury, impaneled in and by this Court for the crime of violating the National Prohibition Act by unlawfully, wilfully and knowingly having in your possession intoxicating liquor containing one-half of one per cent, or more, of alcohol by volume, fit for use for beverage purposes; unlawfully, wilfully and knowingly selling intoxicating liquor; and unlawfully, wilfully and knowingly maintaining a common nuisance by keeping intoxicating liquor for sale in that certain building situate at 246 Lake Street in the City of Reno, Nevada; said crime having been committed on the 3d day of May, 1922, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of

this court. You were duly arraigned upon that indictment, as required by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the third count of the indictment. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ORDERED AND ADJUDGED that you be imprisoned in the county jail of Washoe County, Nevada, for the period of Four (4) Months from and after this date, and that you stand committed in said county jail until the costs, taxed at \$67.60, are paid.

Dated and entered January 12, 1923.

Attest: E. O. PATTERSON,
Clerk.

By O. E. Benham,
Deputy. [22]

In the District Court of the United States for the
District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
G. MONTELATACI and A. LAZARRI,
Defendants.

Motion to Vacate Judgment.

Comes now the defendant G. Montelataci and moves the Court to vacate the said judgment and sentence heretofore made and entered in the above-entitled cause upon the ground that the said verdict is contrary to the law and the evidence, in this: That the said verdict is inconsistent and will not support a judgment, in this, that upon the same trial and as a part of the verdict rendered by the jury in the above-entitled action, the jury returned a verdict of not guilty as to this defendant for the sale of liquor, and the possession of liquor on the same date, and upon the same transaction, upon which verdict of maintaining a nuisance, that of keeping intoxicating liquor for sale was based; all of which is inconsistent with the verdict of guilty of maintaining a nuisance as rendered by the jury.

MILTON M. DETCH,

Attorney for the Defendant, G. Montelataci.

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatchi and A. Lazzari, Defendants. Motion to Vacate Judgment. Filed Feb. 3, 1923. E. O. Patterson, Clerk. By O. E. Benham, Deputy. Milton M. Detch, Attorney at Law, Reno, Nevada, Attorney for G. Montelatchi. [23]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Defendants.

Assignments of Error.

Comes now J. Montelataci, one of the defendants herein, and files the following assignments of error, which he will rely upon in the presentation of the writ of error, in the above-entitled matter from the judgment made and entered by this Honorable Court on this 12th day of January, 1923.

I.

That the United States District Court erred in denying defendant's motion for a new trial, for the reasons herein stated.

II.

That the verdict is insufficient to support the judgment, and that this is manifest from the record, as hereinafter stated.

III.

That the verdict is contrary to the law, as hereinafter stated.

IV.

That the verdict is contrary to the evidence as hereinafter stated.

V.

That the verdict is inconsistent, and will not sup-

port a judgment; in this: that upon the same trial and as part of the verdict rendered by the jury in the above-entitled case, [24] the jury returned a verdict of not guilty, as to this defendant for the sale of liquor, and to the possession of liquor on the same date and upon the same transaction, found a verdict of guilty of maintaining a nuisance, that of keeping intoxicating liquors for sale; all of which is inconsistent with the verdict of maintaining a nuisance, rendered by the jury.

VI.

That the counts of the indictment with reference to maintaining a nuisance does not state facts sufficient to constitute a public nuisance, or any nuisance whatever under the laws of the United States.

VII.

That the evidence is insufficient to support the verdict, for the reasons stated in paragraph six.

VIII.

That the said verdict is contrary to the law and the evidence, in this: that the said verdict is inconsistent and will not support a judgment, in this: that upon the same trial and as a part of the verdict rendered by the jury in the above-entitled action, the jury returned a verdict of not guilty as to this defendant for the sale of liquor, and the possession of liquor on the same date, and upon the same transaction, upon which verdict of maintaining a nuisance, that of keeping intoxicating liquor for sale was based; all of which is inconsistent with the verdict of guilty of maintaining a nuisance^u as rendered by the jury.

IX.

That there is not sufficient evidence upon which the jury can base a verdict of guilty of a nuisance, for the reason that it is not shown by the evidence that defendant is guilty of possession or sale, or that he or his agents had knowledge, or reason to believe [25] that any property or premises owned, used or controlled by him, or otherwise, was so occupied, used, or maintained as a nuisance, as defined by the National Prohibition Act.

X.

That there is manifest error in this: that the evidence fails to show that the said defendant or his agent or agents or anyone under his control, made more than one sale or any sale at all.

XI.

That the Court erred in giving to the jury certain instructions, over the objections and exceptions of defendant, all of which is patent and manifest in the record, and transcript of testimony herein.

XII.

That upon the whole record the judgment is erroneous.

XIII.

That the Court erred in admitting certain testimony duly excepted to, as appears from the record.

XIV.

That the verdict of guilty of a nuisance found against this defendant, is absolutely and wholly inconsistent with the verdict, in favor of and against this defendant and his codefendants.

WHEREFORE, this plaintiff in error prays, that the judgment aforesaid be reversed, and the same remanded for such other and further proceedings as may be proper in the premises.

Respectfully submitted,

MILTON M. DETCH,

Attorney for the Defendant. [26]

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants. Assignments of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney at Law, 307 Nev. State Life Bldg., Reno, Nevada. [27]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge
of the said District Court:

And now comes J. Montelatici, one of the defendants herein, by Milton M. Detch, Esq., his attorney, and says that on the 12th day of January, 1923, this Court entered judgment herein against said

defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said defendant, all of which will more fully appear from the assignment of errors, which is filed, or about to be filed, with this petition.

WHEREFORE, defendant prays that a writ of error may issue in his behalf, out of the United States Circuit Court of Appeals, for the Ninth District, for the correction of the error so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Circuit Court of Appeals aforesaid.

G. MONTELATICI,

Defendant.

By MILTON M. DETCH,

Attorney for Defendant.

[Endorsed]: No.5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants. Petition for Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney at Law, Gazette Building, Reno, Nevada. [28]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

Order Allowing Writ of Error.

Let a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Nevada, as prayed for in the petition of the said J. Montelatici, and that the citation be issued to the defendant in error.

And it now appearing that a citation has been served in the above cause, it is now

ORDERED that a writ of error, allowed as above stated, operate as a supersedeas and the defendant be admitted to bail upon furnishing a good and sufficient bond in the penal sum of Four Thousand Dollars, conditioned according to law.

Dated Feb. 3, 1923.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 5495. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants. Order. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M.

Detch, Esq., Attorney at Law, Gazette Building,
Reno, Nevada. [29]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,
Defendants.

Bail Bond on Writ of Error.

We, J. Montelatici, as principal, residing at Reno, Washoe County, State of Nevada, and J. L. Semenza and L. Devincenzi, as sureties, residing at Reno, County of Washoe, State of Nevada, acknowledge ourselves to be jointly and severally indebted to the United States of America, in the sum of \$4,000.00, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenants, upon this condition; that if the said G. Montelatici, the defendant upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals, for the Ninth Circuit, and is now pending, shall be and appear at the District Court of the United States for the District of Nevada, upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate, showing the disposition thereof by the said Court of Appeals, or within five days there-

after, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and effect. [30]

IN WITNESS WHEREOF, the said G. Montelatici has hereunto set his hand and seal, as principal, and the said J. L. Semenza and L. Devincenzi, as sureties, have hereunto set their hands and seals, all done this 31st day of January, 1923.

G. MONTELATICI. (Seal)

J. L. SEMENZA. (Seal)

L. DEVINCENZI. (Seal)

State of Nevada,
County of Washoe,—ss.

J. L. Sémenza and L. Devincenzi, sureties on the annexed and foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says, that he is a resident and freeholder within the County of Washoe, State of Nevada, and that he is worth the sum of \$4,000 over and above all his just debts and liabilities, and property not exempt from execution.

J. L. SEMENZA.

L. DEVINCENZI.

Subscribed and sworn to before me this 31st day of January, 1923.

[Seal]

GEORGE S. HALL,
Notary Public.

Taken and approved this 31 day of January, 1923.

GEORGE SPRINGMEYER,
United States Attorney.

By _____,
Assistant United States Attorney.

E. S. FARRINGTON,
U. S. District Judge. [31]

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants. Bail Bond on Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney for Defendants. Gazette Building, Reno, Nevada. [32]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

J. MONTELATICI and A. LAZZARI,
Defendants.

Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, G. Montelatici, as principal, and J. L. Semenza and L. Devincenzi, as sureties, of the County of Washoe, State of Nevada, are held and

firmly bound unto the United States of America, in the sum of \$500.00 lawful money of the United States; to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 31st day of January, 1923.

WHEREAS, the above G. Montelatici has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment of the District Court of the District of Nevada, in the above-entitled cause:

NOW THEREFORE, the condition of the obligation is such that if the above-named G. Montelatici shall prosecute his said appeal to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF the said G. Montelatici, has hereunto set his hand and seal, as principal, and the said J. L. Semenza and L. Devencenzi, as sureties, have hereunto set [33] their hands and seals, all done this 31st day of January, 1923.

G. MONTELATICI. (Seal)

J. L. SEMENZA. (Seal)

L. DEVENCENZI. (Seal)

State of Nevada,
County of Washoe,—ss.

J. L. Semenza and L. Devencenzi, sureties on the annexed and foregoing undertaking, being first duly sworn, each for himself and not one for the

other, deposes and says, that he is a resident and freeholder within the County of Washoe, State of Nevada, and that he is worth the sum of \$1000 over and above all his just debts and liabilities, and property not exempt from execution.

J. L. SEMENZA.

L. DEVENCENZI.

Subscribed and sworn to before me this 31st day of January, 1923.

[Seal]

GEORGE S. HALL,

Notary Public.

Taken and approved this 31 day of January, 1923.

GEORGE SPRINGMEYER,

United States Attorney.

By _____,

Assistant United States Attorney.

E. S. FARRINGTON,

U. S. District Judge. [34]

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazzari, Defendants. Cost Bond on Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney for Defendants. Gazette Building, Reno, Nevada. [35]

In the District Court of the United States, in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. MONTELATICI and A. LAZZARI,

Defendants.

**Stipulation Fixing Time for Filing Proposed Bill of
Exceptions.**

It is hereby stipulated and agreed by and between counsel for the respective parties that the defendant, G. Montelatici, shall have up to and including the 10th day of March, A. D. 1923, for filing proposed bill of exceptions and that the said defendant shall have up to and including the 24th day of March, A. D. 1923, to file Record in the Circuit Court of Appeals and to do such other and further things as may be necessary to effect his said appeal.

GEORGE SPRINGMEYER,

United States Attorney.

By CHAS. A. CANTWELL,

Assistant.

MILTON M. DETCH,

Attorney for Defendant, G. Montelatici.

Dated this 24th day of February, A. D. 1923.

[Endorsed]: No. 5495. U. S. District Court, District of Nevada. The United States vs. G. Mon-

telatici and A. Lazzari. Stipulation. Filed Feb. 26, 1923. E. O. Patterson, Clerk. [36]

In the District Court of the United States, in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. MONTELATICI and A. LAZARRI,

Defendants.

**Stipulation Fixing Time for Filing Proposed Bill of
Exceptions.**

IT IS HEREBY STIPULATED AND AGREED
by and between counsel for the respective parties,
that the defendant G. Montelatici shall have up to
and including the 20th day of March, 1923, in which
to prepare and file proposed bill of exceptions in
the above-entitled cause, and that the said defend-
ant shall have up to and including the first day of
April, 1923, in which to file his transcript of record
in the Circuit Court of Appeals, and to do such
further and other things to perfect said writ of
error, as he may be advised.

Dated at Reno, Nevada, this 8th day of March,
1923.

GEORGE SPRINGMEYER,

United States Attorney.

By CHAS. A. CANTWELL,

Assistant United States Attorney.

MILTON M. DETCH,

Attorney for Defendant.

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants. Stipulation. Filed March 10, 1923. E. O. Patterson, Clerk. Milton M. Detch, Esq., Attorney for Defendant G. Montelatici. Gazette Building, Reno, Nevada. [37]

In the District Court of the United States in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and ARMATRADDO LAZ-
ARRI,

Defendants.

**Stipulation Fixing Time for Filing Proposed Bill
of Exceptions.**

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties, that the defendant J. Montelatici shall have up to and including the 25th day of March, 1923, in which to prepare and file proposed bill of exceptions in the above-entitled cause, and that the said defendant shall have up to and including the first day of April, 1923, in which to file his transcript of record in the Circuit Court of Appeals, and to do such further and other things to perfect said writ of errors, as he may be advised.

Dated at Reno, Nevada, this 20th day of March, 1923.

GEORGE SPRINGMEYER,
United States Attorney.
By CHAS. A. CANTWELL,
Assistant United States Attorney.
MILTON M. DETCH,
Attorney for Defendant.

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Armatraddo Lazarri, Defendants. Stipulation. Filed March 21, 1923. E. O. Patterson, Clerk. Milton M. Detch, Attorney for Defendant J. Montelatici. Gazette Building, Reno, Nev. [38]

In the District Court of the United States in and for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and ARMATRADDO LAZARRI,

Defendants.

Praeipce for Transcript of Record.

To E. O. Patterson, Clerk of the United States District Court, Carson City, Nevada.

Request is made on you, that you have prepared

all papers and records in the above-entitled case, as follows:

1. Indictment.
2. Verdict of the jury.
3. Motion in arrest of judgment, rulings thereon and exceptions thereto.
4. Motion for a new trial, rulings thereon and exceptions thereto.
5. Judgment and sentence.
- 5½. Motion to reverse judgment.
6. Petition for writ of error.
7. Order allowing writ of error.
8. Writ of error.
9. Assignments of error.
10. Citation.
11. Bill of exceptions.
12. All stipulations extending time for preparing motion for a new trial, assignment of errors and bill of exceptions.
13. Withdrawal of Messrs. Frame & Rafetto, attorney for J. Montelatici and substitution of Milton M. Detch, Esq., as attorney for the defendant.
14. All minutes of Clerk of Court showing the Court's ruling upon all motions, rulings and exceptions.
15. Supersedeas bond. [39]
16. Cost bond.

MILTON M. DETCH,
Attorney for the Defendant J. Montelatici.

[Endorsed]: No. 5495. In the District Court of the United States in and for the District of Nevada.

United States of America, Plaintiff, vs. J. Montelatici and Armatraddo Lazzari, Defendants. Praecipe for Transcript of Record. Milton M. Detch, Esq., Attorney for Defendant, J. Montelatici. Gazette Building, Reno, Nevada. Filed March 23, 1923. E. O. Patterson, Clerk. By O. E. Benham, Deputy.
[40]

In the District Court of the United States in and
for the District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and ARMATRADDO LAZZARI,

Defendants.

Bill of Exceptions for Defendant J. Montelatici.

BE IT REMEMBERED that this cause came on to be heard on the 25th day of November, 1922, before Honorable E. S. Farrington, Judge of said Court, and a jury therein, duly sworn to try said cause; and the following testimony was offered and presented on behalf of the plaintiff and defendant.

Testimony of P. Nash, for the Government.

P. NASH, called and sworn as a witness for the plaintiff, testified as follows:

Direct Examination by Mr. CANTWELL.

Am a Federal Officer and National prohibition

(Testimony of P. Nash.)

agent; familiar with the premises known as the New Toscano, Reno, Nevada; situate at 246 Lake Street; was on those premises May 3d, 1922; agents DuBois and Brown went in the premises with me; agent Scott was already in the premises; found him there when I arrived; went directly to the east end of the bar; noticed Scott leaning against end of bar; noticed Lazarri, one of the defendants, just going around the corner toward the stairway; in his right hand he held a bunch of keys; in his left hand he had four glasses, two whiskey glasses and two wine glasses; saw Scott before that evening, about ten minutes before; when I entered bar, saw Lazarri going towards the stairs; I stopped Lazarri and took keys from him; went upstairs [41] and endeavored to find supply of liquor; I did not find any; then went behind bar with agent Brown, and found cash register open, and took therefrom marked five dollar silver certificate; it was in sight there in the cash register; saw that before, in office of Prohibition Director, about five or ten minutes before; it had been marked by myself by tearing off one corner; Scott had no other money on him at that time; when Mr. Scott was found there in the New Toscano, ten or fifteen minutes after that, there was a search made of his person by agent Brown; it was made in my presence; saw some money taken out by agent Dubois; defendant Montelatici was there that evening behind the bar; I identify this as the identical bill which was given by us to

(Testimony of P. Nash.)

agent Scott that night, and later found in the cash register.

Cross-examination by Mr. FRAME.

Made a search of the premises and did not find any liquor on the premises except on Mr. Scott; that was a bottle that Mr. Scott had in his pocket; when I went in saw Lazarri there; he was possibly six feet from the end of the bar; Mr. Montelatici at that time was behind the bar; I saw intoxicated persons in the place that evening; saw intoxicated persons about this place at other times; that was a frequent occurrence.

Testimony of Thomas Scott, for the Government.

Mr. THOMAS SCOTT, called as a witness for plaintiff, duly sworn, testified as follows:

Direct Examination by Mr. CANTWELL.

Was a Federal Prohibition Officer in the month of May of this year; I am familiar with the premises known as the New Toscano Hotel on Lake Street in Reno; was in those premises on the 3d day of May 1922, the first time at 8.50 P. M.; Lazarri was in there when I went in; I bought one drink from him, and paid fifty cents for it; he went upstairs some place, he went [42] out of the bar-room, went upstairs with the glass in his hand; came down in a moment and gave me the glass of whiskey; I consumed that drink there on the premises; he put the money in the cash register; then I left there and went over to Captain Don-

(Testimony of Thomas Scott.)

nelly's office; I was searched there by agents Dubois and Brown; all of my possessions were taken from me, money and one thing and another; I was given a five dollar bill, and was informed it was marked money and told to return to the New Toscano and purchase a bottle of whiskey, which I did; I then returned to the Toscano; immediately after leaving Captain Donnelly's office; had no liquor on me at that time; I had no money on me other than this marked five dollar bill; when I entered the Toscano the second time that evening, both of these defendants were there; they were back of the bar; at that time I bought a drink and a small beer bottle of whiskey from Lazarri; when I went in there that second time, I told him to give me a little shot, and also a bottle; he got a little bottle from a box near the end of the bar, the east end of the bar, from a box of bottles, he went upstairs; he handed me the drink and the bottle; I put the drink into my mouth and went into the toilet and empties it into a small vial; preserved that as evidence, as I did also the bottle; I paid Lazarri two fifty for the drink and bottle, and the money was put in the cash register; paid him with the marked five dollar bill, and received two dollars and fifty cents in change; he rang up the two dollars and fifty cents on the cash register; I remained there for a little while after I had bought the bottle, and then I asked him for another drink; he got same glasses—I don't know how many—but he had his hand full of glasses on his way to go upstairs, when

(Testimony of Thomas Scott.)

the door opened and the other officers entered. Then Mr. DuBois and Mr. Brown came over and searched me and found the bottle [43] in my pocket; I also had this little vial but they didn't locate it; the other bottle I had in my trousers pocket; they searched me again when I returned to the office, which I did immediately, and took the two and a half; that was found in my pocket at the office; the two and a half found in my pocket at the office was the two and a half I received from Lazarri, the change for the five dollar bill; I turned the small vial over to Captain Donnelly, on the same night, in the office; he was in the office when I returned; I returned prior to the other agents; while I was there I saw Mr. Nash go to the cash register, which was open; when he pushed the button, the drawer flew open, and he hadn't closed the drawer when the other agents came in; I saw Mr. Nash taking a bill from the cash register; I was in those premises before with agent McNeill, on April 10th and purchased four drinks; one for McNeill, one for myself, one for Tony Lazarri and one for a man by the name of F. McAvoy, who happened to be in there, and also a small flask, for which I paid a dollar and a half, and two dollars for the four drinks; the liquor was brought from somewhere in the back room and the barroom, and served in a little office in front of the barroom; it was brought in a lemonade glass and from the lemonade glass, poured into the whiskey glasses; this flask was purchased at that time; I was in there

(Testimony of Thomas Scott.)

again on April 29th at 11:15 A. M. I went in alone; I was sent down there by the Director to see if they was still selling it in the New Toscano; I went in there and was taken into the little room and purchased one drink of corn whiskey from Montelatici, one of the defendants; I saw other transactions while I was in there; I saw two men standing at the bar; I didn't hear them asking for anything, but just a moment later I was there they was handed a small bottle, beer bottle; they paid five dollars for the beer bottle and two and [44] half was rung up in the cash register, and they got the change; I purchased and drank; it was corn whiskey; on the night we raided the place, the night I *bot* the bottle, there was a fellow standing at the bar very drunk; he got into an argument about his change; he bought something there and wanted his change, and he was very much intoxicated; and there was possibly twenty-five men in there, some of them under the influence of liquor; every time I have been there the same conditions prevail, possibly not so many men; Plaintiff's Exhibit No. 2 for identification is the bottle I purchased that night, with my initials on it; on that night of May 3d; that is the bottle that was taken from my pocket by the Prohibition Officers that night.

Cross-examination of Witness SCOTT by Mr.
FRAME.

Lived in Nevada; known the defendant about a month before the 3d of May; Mr. McNeill made me

(Testimony of Thomas Scott.)

acquainted with them; he was a Federal Prohibition Agent and I was taken in there and made acquainted with Mr. Lazarri; he took me in there and he introduced me to Mr. Lazarri; I didn't tell him who I was, or I could not have *bot* the liquor; my occupation was a Federal Prohibition Agent; I was working under cover at that time; I did not represent myself as a railroad man, nor represented to Mr. Lazarri that I was a railroad man; it is a fact that on Commercial Row and on Lake Street, in that vicinity, there at all times, almost day and night, great numbers of people congregated, and that you may go there on the street along two blocks of that place, most any time of the day and see persons that are intoxicated, or more or less intoxicated; it is nothing unusual for persons who are intoxicated to go into places when in that condition, and come out of places; on this occasion I was first searched to ascertain what money I had, in the Prohibition Director's office, and at that time I was given a five dollar [45] bill, and that was the only money I had; I returned to the Prohibition Director's Office and was again searched; I had two fifty in silver; this search was made on May 3d, between nine-thirty and ten o'clock at night; from there I went directly to the Toscano Hotel from the Prohibition Director's office; when I entered the New-Toscano Hotel there was between twenty and twenty-five men in there; I didn't know any of them, they was mostly Italians; when I went into the place Lazarri was behind the bar and

(Testimony of Thomas Scott.)

Montelatici was in front of the bar near the end; shortly after I went in there, a moment after I went in there, Montelaticu went behind the bar; he was in front of the bar when I first entered; he went in back of the bar while I was in there; I didn't see him sit down at any table; I saw him behind the bar; when I purchased a drink Lazarri went upstairs and Montelatici took his place back of the bar; the first thing I did there, I walked over in a leisurely way and asked for a drink from Lazarri; Lazarri was back of the bar, and at that time Montelatici was in front of the bar; never had any conversation with Mr. Montelatici at that time; when I went in I gave him a bill, five dollars, and I was returned two dollars and fifty cents, which I presume paid for the drink and the bottle, there was no contract or agreement made; I simply *bot* it and gave him the five dollar bill; I told him when I went in that I wanted a small bottle of booze; I did not tell him about what price; prior to going into that place I hadn't had a drink; I had a drink at ten minutes to nine, I was sent there by the Director to see if I could purchase liquor there; when I went in there I didn't want a drink and didn't drink the drink; I saved it in the little vial; after I had made this purchase I waited a few moments, waiting for the other agents to come in; then I asked Lazarri for another drink; he got some glasses from back [46] of the bar—just how many I don't know; but he got a handful and he immediately started for the back part of the

(Testimony of Thomas Scott.)

barroom when the front door opened and the other agents entered; I was searched and requested to leave the building; he told me to get out after he got the bottle; no other liquor was found, to my knowledge, except what I had in my pocket; I was still there when Mr. Nash went to the cash register; the drawer of the cash register was open and I see Mr. Nash taking a bill from the cash register; he called the two defendants over; just about that time I left; the cash register was open, the drawer was open; it was open when Mr. Nash went behind the bar.

Redirect Examination by Mr. CANTWELL of Witness SCOTT.

I have been for some time working as a Federal Prohibition agent; since February 20th; and in a number of instances made purchases of what I call whiskey; and in many of those cases there has been a subsequent analysis made by Professor Dinsmore of those same liquids which I classed as whiskey, and my familiarity with the taste of liquors and from my familiarity with the testimony given by Professor Dinsmore as to what chemical analysis of those same liquors shows by way of alcoholic content, I am able to state whether this liquid which I purchased at various times and which I call whiskey, contained more than one half of one per cent of alcohol by volume.

We now offer in evidence Plaintiff's Exhibit No. 1, on the foundation laid in the testimony of agents Nash and Brown.

Testimony of S. C. Dinsmore, for the Government.

Mr. S. C. DINSMORE, called as a witness by plaintiff, was sworn and testified as follows:

Direct Examination by Mr. CANTWELL.

Am in charge of the State Food and Drug Laboratory; I am a chemist. [47]

Q. Will you look at the bottle, Exhibit No. 2, which is immediately in front of you, Professor Dinsmore, and state whether or not that has ever been in your possession? A. It has.

Q. Do you remember how it came in your possession?

A. It was handed to me by one of the officers, brought to the laboratory by Mr. DuBois.

Q. On what day? A. On May 4th.

Q. Do you remember its condition at that time, as to whether it was of the same content as at present. A. It is, yes; the bottle was sealed.

Q. Did it contain more in the way of contents then than it now has?

A. Yes, a portion was removed.

Q. Did you make any analysis of the contents of that particular bottle delivered to you that day?

A. I did.

Q. To determine the alcoholic content?

A. To determine the alcoholic content.

Q. By volume? A. Yes, sir.

Q. And what did you determine to be the alcoholic content of that liquor?

(Testimony of S. C. Dinsmore.)

A. I found that it contained 51.77 per cent alcohol.

Q. By volume? A. By volume.

Q. Is that a liquor that bears any name about this country?

A. I classed it as corn whiskey.

Q. Did you class it as such a liquor as could be used for beverage purposes? A. Yes, sir.

Testimony of P. E. DuBois, for the Government.

Mr. P. E. DUBOIS, called as a witness for plaintiff, having been previously sworn, testified as follows:

Direct Examination by Mr. CANTWELL.

I am a Federal Prohibition Agent, working in that capacity on the 3d day of May of this year; I was around the premises [48] known as the New Toscana on the evening of that day; I entered the premises with Nash and Brown; when I entered I saw Prohibition Agent Scott in there; I searched Mr. Scott there in that barroom that evening; immediately after I entered, I took a small bottle containing liquor from him; I sealed it soon after taking it from him and labeled it; kept it until the next day; turned it over to the State Chemist; Plaintiff's Exhibit No. 2 for Identification is the bottle I have been testifying about.

Mr. CANTWELL.—I now offer this bottle and its contents in evidence on the foundation laid by the testimony given.

Mr. FRAME.—No objection.

(Testimony of P. E. DuBois.)

(The bottle is admitted in evidence and marked Plaintiff's Exhibit No. 2.)

I made further search of the premises that evening; I went upstairs, and I searched in three or four rooms upstairs; that was open; I did not discover anything in the way of liquor there; I saw a piece of currency, a bill taken from that building that evening, by Mr. Nash, from the cash register; the cash register was open; had seen that bill before, in Captain Donnelley's office, a few minutes before; the number was taken on it for identification, and it was turned over to agent Scott; to use that at the New Toscano to get evidence, and there was no money left until this five-dollar bill was given him; We left the Prohibition Offices immediately, when Scott left, and I followed him closely; kept him in sight at all times; from the time he left the Prohibition Office until he entered the New Toscano, he was not out of my sight at any time; Plaintiff's Exhibit No. 1 is the piece of money in question; the corner off, and the serial number was torn off; had been in that place prior to the 3d day of May and after these defendants had gone into the place, I was in there during the month of December; [49] Mr. Nash, Mr. Brown and agent Sheehan were there at that time; they were all prohibition agents; it was on the 12th of December, 1921, I was there; I made a search of those premises at that time; agent Sheehan and I went into the cellar, and we found a quart bottle about two-thirds full, in the cellar near where the cigars were kept; it appeared

(Testimony of P. E. DuBois.)

to be corn whiskey; I tested it; Mr. Montelatici was there at that time; he was in the barroom.

Cross-examination by Mr. FRAME.

Found a bottle of liquor, quart bottle partly full, containing a quantity of liquor, December 21, 1921, at 2:00 P. M. that was shortly after Mr. Montelatici and this defendant took possession of the premises; this was under a lot of cigar boxes in the basement, almost directly under the barroom; I recall that it was shown upon the hearing before the United States Commissioner that these men never had any knowledge of the presence of that bottle in the place it was at, and that they were discharged on the ground of the insufficiency of the evidence; we all entered the place together on May 3d; almost immediately the door was opened and Nash, Brown and I went in; Nash and Brown jumped over the bar, and after Brown had jumped over he ran to the east end, and I had gone around the east end, and we went to where Scott was standing, and we searched Scott; Plaintiff's Exhibit No. 2 is the bottle. In our search of the premises I did not find any liquor stored there at that time; the only liquor I saw there was what Scott had in his pocket.

Testimony of H. P. Brown, for the Government.

Direct Examination of the Witness H. P. BROWN,
by Mr. CANTWELL.

Witness called and sworn and testified as follows:

(Testimony of H. P. Brown.)

I am a Federal Prohibition Agent; have been for some time; was a Federal Prohibition Agent on December 12, 1921; I was in the premises of those defendants, called the Toscano, on [50] that day; Mr. Nash and Mr. Brown and Mr. Sheehan went in there; I made a search of the premises at that time and in a little room off from the barroom we found a quart bottle, a beer bottle, about half full of liquor, in a fur overcoat hanging on the wall; did not taste the contents of that bottle; just merely smelled it; it had an alcoholic smell; this was in a coat hanging in that little room at the end of the barroom; when I was in there on December 12, 1921, I saw Mr. Montelatici; he was behind the bar; we jumped over the bar, and he was behind the bar; I was also in the premises on May 3d of this year, around nine o'clock in the evening; we entered the house with Mr. DuBois and Mr. Nash; Mr. Scott was in there alone; he was standing at the lower end of the bar; both of the defendants were in there at the time I entered; Mr. Montelatici was behind the bar and Lazarri was on his way up stairs with two whiskey glasses and two wine glasses and a bunch of keys in his hand; then Mr. Nash and I jumped over the bar; we made a kind of a little search and I walked back to Mr. Scott, Mr. DuBois was there by Mr. Scott, and I held Mr. Scott while Mr. DuBois made the search; Mr. DuBois pulled out a bottle out of Mr. Scott's pocket; Mr. Nash and I went upstairs and searched a couple of rooms up there at the head

(Testimony of H. P. Brown.)

of the stairs; I did not discover any liquor on the premises at all that night.

Cross-examination of Witness BROWN by Mr.
FRAME.

The only liquor that I found or saw then on that occasion was in the possession of Mr. Scott and taken from his pocket; there was one bottle taken from Mr. Scott; he made resistance to being searched at that time; he actually kicked and attempted to prevent me from searching him, and in that search I didn't find anything; but Mr. DuBois pulled a bottle out of his pocket.

Testimony of A. Lazarri, for Defendants.

Mr. A. LAZARRI, one of the defendants, being called as a witness, after being duly sworn, testified as follows:

Direct Examination by Mr. FRAME. [51]

Q. Your name is A. Lazzari? A. Yes.

Q. How long have you lived in this country, Mr. Lazarri? A. About thirteen years.

Q. And where? A. Mostly in Reno and Yerington.

Q. What has been your occupation?

A. Used before come dry I tend bar for Frank Rosachi down in Yerington, and after that in the army.

Q. How long were you in the army?

A. Twenty months; I was in the Second Division, Ninth Infantry.

Q. That was in the war, was it?

(Testimony of A. Lazarri.)

A. War-time, yes.

Q. And where did you see any service at the front?

A. On B 7, front line, fifteen from the fire line.

Q. Were you wounded?

A. I was wounded both times.

Q. Where did you enlist or go from to the army?

A. I go from Yerington; I go to Camp Lewis, and from Camp Lewis to New York, and from New York to France.

Q. You know this man Thomas Scott?

A. Yes, sir.

Q. How long have you known him?

A. I have known him for seven months, maybe more than that.

Q. When you first knew him how did you know him?

A. He came over there to buy some cigars and some drinks, and eat once in a while.

Q. What kind of drinks? A. Soft drinks.

Q. What did he represent himself to be; how did he introduce himself to you?

A. I don't know, he came down over there.

Q. Did he tell you what he worked at or what he did?

A. He said he was engineer on the railroad, a railroad man.

Q. Now, you have heard his testimony that you sold liquor on the 3d day of May last, and that you sold some drinks on other occasions? A. Yes.

(Testimony of A. Lazarri.)

Q. I will ask you to state if you ever sold Mr. Scott any intoxicating liquors?

A. I never sold him any liquor at all.

Q. I will ask you to state if you ever sold Mr. Scott any intoxicating liquor.

A. I never sold him any liquor at all.

Q. Did you deliver this bottle that was introduced in evidence as Plaintiff's—

A. No, I don't know this bottle at all.

Q. Do you recall Mr. Scott being in your place at that time; do you remember of him being in the place at that time?

A. Oh, yes; he was there.

Q. Did he buy something from you? A. Yes.

Q. Did he give you a bill?

A. He gave me a five-dollar bill and I change it, and he take a glass of beer, and I give him four dollars and ninety cents back.

Q. And that is the time you came in possession of that bill, is it?

A. Yes, that is all I sold him, and it is legal for me.

Q. Did Mr. Montelatici have anything to do with that transaction?

A. Mr. Montelatici outside the bar playing cards and a man come in to the bar and ask for a glass of milk, and he go behind the bar himself.

Q. Did Mr. Montelatici have anything to do with your transaction with Mr. Scott? A. No, sir.

Q. He didn't participate in it in any way?

A. No, sir; he never have anything to do with it.

Testimony of J. Montelatici, for Defendants.

Mr. J. MONTELATICI, one of the defendants, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. FRAME. [53]

Q. Your name is J. Montelatici?

A. G. Montelatici.

Q. You have heard Mr. Scott's testimony about buying a bottle of liquor in the New Toscano, a bottle of whiskey shown here?

A. I see Mr. Scott down there; I no see before.

Q. Did you see Mr. Lazarri deliver a bottle of whiskey, corn whiskey to Mr. Scott?

A. I no see nothing at all.

Q. Did you ever have knowledge of any such transaction? A. No, sir.

Q. Did you ever sell any intoxicating liquor of any kind to Mr. Scott? A. No, sir.

Q. You heard some testimony about an overcoat and a bottle, I will ask you to state to the jury whose overcoat that was.

A. It was a Mr. Laventino; he came down there to my place and it is pretty cold and snow, and he says, "I want to hand up my coat in the office"; I say, "All right"; I don't know nothing about it. And that time, about five o'clock or ten minutes, he jump back of the bar and go through that coat.

Q. Did you know anything about the bottle?

A. I don't know anything about it, no.

Q. Referring to a bottle down in the basement

(Testimony of J. Montelatici.)

there, I will ask you what the fact is about that, a bottle that was found under some cigar boxes in the basement a short time after you went to the place?

A. Yes, he say he find it down there; I don't know; I have that place about a month before.

Q. Did you know anything about it?

A. I don't know nothing about it.

Q. Did it belong to you? A. No, no.

Q. That was found under some boxes in the basement, I understand. [54]

A. That is all, find some bottle around there.

Cross-examination by Mr. CANTWELL.

Q. When did you buy into that place;—do you remember what day, Mr. Montelatici? A. Yes, sir.

Q. What day, please?

A. September 13th, 1921.

Q. Ever since that day you have been one of the owners of the place? A. Yes, sir.

Q. And Mr. Lazarri, your partner, has been in there all this same time? A. Same time.

Q. And you still own the place? A. Yes, sir.

Q. And still run it? A. Yes, sir.

Redirect Examination by Mr. FRAME.

Q. Mr. Montelatici, has anyone since you have been there, sold or disposed of intoxicating liquors in that place to your knowledge? A. No, sir.

Q. Have you ever given your consent, or knew that intoxicating liquors were disposed of in that place since you have been proprietor? A. No, sir.

(Testimony of J. Montelatici.)

Recross by Mr. CANTWELL.

Q. You and Mr. Lazarri have attended to the bar in your place all the time since you have owned it, have you not?

A. I no work back of the bar; sometime, you know, when he want to take a little fresh air, I get behind the bar.

Q. Sometimes you work behind the bar for a few minutes? A. Just a few minutes, not much.

Q. Have you hired bartenders there?

A. Yes, I got a bartender.

Q. And this is just a soft-drink place, is it?

A. My son tend bar there.

Q. Is he the only bartender that has worked there? [55] A. For me, yes.

Q. And Mr. Lazzari has tended bar part of the time, has he? A. Tend bar in the night-time.

Q. And your son in the daytime? A. Yes.

Q. And sometimes you go on a few minutes to let either one or the other off for a while.

A. Yes, for fresh air.

Q. You have rooms upstairs at your place have you? A. Yes, sir.

Q. You rent those rooms out to people?

A. Hotel room; I got hotel room there and soft-drink parlor.

Q. How many rooms upstairs?

A. About twenty-six.

Mr. FRAME.—Q. You also feed a good many people, serve meals, do you.

A. I serve lots of meals every day.

No other or further evidence was introduced in the trial of said cause.

Thereupon counsel for the respective parties made their arguments to the jury.

Thereupon the Court orally instructed the jury as follows:

Instructions of Court to the Jury.

“The indictment found by the grand jury in this case charges that on the 3d day of May, 1922, at Reno, these defendants had intoxicating liquor in their possession; the second count charges that on the same day they sold intoxicating liquor, and the third count charges that on or about the 3d day of May, A. D. 1923, the defendants were maintaining a common nuisance at Reno, Nevada.

“The National Prohibition Act, notwithstanding the comments made on it, is a very carefully drawn piece of legislation. It has been pronounced constitutional by the highest courts in the land. It was passed because Congress believed it was the proper thing to do. The Eighteenth Amendment became a part of the [56] Constitution of the United States in the manner provided by the Constitution. The Amendment and the law itself have been adopted just as every other constitutional amendment, and every other Federal statute has been adopted. Whether the law was a good law or a bad one, was a question for Congress, not for us; it is immaterial whether it is good or bad, or whether it is wise or unwise whether it would have been better to have made it other than it is; it is the law of the land,

and under our oaths you and I are bound to enforce it as it is written. We have no right to say we will not enforce it because we do not approve it; our oaths are to the contrary. There is nothing for us to do but to decide whether these two defendants have been guilty of violating it. If they have violated it, it is your duty to bring in a verdict of guilty; or if their guilt has not been proven in the manner which will be pointed out, it is your duty to bring in a verdict of not guilty.

The first two charges of the indictment, the possession and the sale of intoxicating liquor, are prohibited in section 3 of Title II of the Act: "No persons shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, sell or possess any intoxicating liquor, except as authorized in this Act."

There is absolutely nothing in the Act which permits and authorizes one to have intoxicating liquor in a soft-drink place, absolutely nothing. One who has intoxicating liquor in his possession in a soft-drink place is violating the law, that is, if it is a conscious possession. One must know that he is violating the law in order to be guilty. In other words, if a man slips a bottle of whiskey into your house, and you know nothing about it, you are not guilty of possession, because it is not a conscious possession; but if the whiskey is put there [57] with your knowledge then it is a conscious possession. If you are maintaining and carrying on a soft-drink place, and some one brings a bottle of whiskey there and you know nothing about it, that

is not your possession, though it is on your premises; it is not your conscious possession; but if you find it and keep it, that is another matter.

Intoxicating liquor is defined in the first section of Title II of the Act which says:

“When used in Title II or Title III of this Act the word ‘liquor’ or the phrase ‘intoxicating liquor’ shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one half of one per centum or more of alcohol by volume, which are fit for beverage purposes.”

This language is very broad; it includes everything by whatever name or brand which contains one-half of one per centum or more by volume of alcohol, provided it is fit for use as a beverage. Anything fit for use as a beverage which is taken for the pleasure of drinking.

The third count is for maintaining a nuisance, defined in Section 21, Title II of the Act as follows:

“Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor.”

This language is also broad and comprehensive. It says any room, any house, any building, any boat, any vehicle, any structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title.

The charge in the indictment is that defendants "did unlawfully, wilfully and knowingly maintain a common nuisance, in that the said defendants did unlawfully, wilfully and knowingly keep in that certain building situate at Number 246 *Lake* [58] in the City of Reno, County of Washoe, State and District of Nevada, known as and called the 'New Toscano Hotel,' intoxicating liquor for sale; said liquor containing one-half of one per cent or more of alcohol by volume, and being fit for use for beverage purposes."

The essence of the charge of nuisance is that liquor is kept for sale as a matter of business. It is immaterial whether one or ten sales are made; if liquor is kept for sale, and that is the business and the intention of the party who keeps it, it is a violation of Section 21, Title II of the Act and the place becomes a common nuisance.

A question was asked by one of the jurors as to whether the title to the property cut any figure in this case, and my answer is unqualifiedly no. There are two proceedings under this Act; one is criminal and the other is in equity. This proceeding before you is a criminal proceeding; the other is equitable and comes before the court without a jury. Here the question is whether these parties kept this whiskey in the New Toscano saloon or

hotel for sale, as is charged in the indictment. It is immaterial whether they owned the building, whether they leased it, or whether they were there just over night; if they were there and keeping liquor for sale in a public place, they were guilty of a criminal offense. The equitable proceeding is against the owner of the property. It must be shown not only that he owned the place and that liquor was sold there, but that he knew it; otherwise his property cannot be closed as a nuisance. I am explaining this because the question has been asked. You are not concerned with it. If proceedings are taken to declare the property a nuisance, it must be in a new suit with evidence which goes against the owner of the property, showing that he had guilty knowledge of what was going on. [59]

Section 33 of the Act provides:

“After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor, shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.”

Possession of intoxicating liquor in a soft-drink place is not permitted under the Act; its possession in a soft-drink place, provided the possessor knows he has it, is presumed to be for the purpose of barter, sale, exchange, to be given away or otherwise disposed of; and the burden of the proof is upon the possessor in any action concerning the same, to

prove that such liquor was lawfully acquired, possessed and used.

The Government has made these charges and the defendants have denied them; that throws upon the Government the burden of proving defendants' guilt. It must be proven, as has been repeatedly said before you in these cases, beyond a reasonable doubt. The reasonable doubt must be a substantial doubt; a reasonable doubt is not every doubt; it is not a mere possibility that defendants' guilt has not been proven, but it is a substantial doubt as to whether their guilt has been established by the evidence or not.

This rule was not devised and made lightly or thoughtlessly; it has been a part of our jurisprudence for ages; it was designed, not to enable guilty men to escape, but to prevent the possibility of innocent men being convicted. If after careful consideration of all this testimony you are satisfied to a moral certainty that these defendants are guilty as charged, it is your duty to so find.

You are to accept the law as I give it. If I am wrong you are not responsible. If I make a mistake it can be corrected in another court, but if you fail to follow the instructions you are unfair to one party or the other, and you are not doing [60] as the law requires you to do. On the other hand, it is your duty to decide what is proven by this testimony. It is immaterial what counsel say or what the Court says as to the facts or as to what the facts prove; that is a matter which is up to your judgment. You cannot follow even the judgment of

the Court unless it appeals to you as being correct.

It is also your province to decide what credence shall be given to the testimony of the witnesses. Every witness who appears upon the witness-stand is himself an exhibit, his story is to be examined. It is presumed of course in the beginning that every witness will tell the truth, but unfortunately some of them do not. You are to weigh the testimony of the witnesses in the same scales. The testimony of one witness may weigh more than the testimony of another, or more than the testimony of a dozen witnesses against him. It is for you to determine who is telling the truth.

Mr. Scott is the principal witness for the Government. It is true he is an officer; it is equally true that men commit crimes, and it is essential to the administration of justice that we have policemen, secret service officers and sheriffs; it is necessary because there are criminals, and there must be some one whose duty it is to apprehend them, and to discover and obtain the evidence which is needed to bring them to justice. It does not necessarily follow because a man wears a star, or is a sheriff, or a secret service officer, or because he holds any other office under the Government, that he is prejudiced so that he cannot tell the truth, or that his evidence must be taken as absolute gospel. He may be mistaken, but you are entitled to consider the fact that he is an officer, and to throw that fact into the scales in determining how much credence you will give to his testimony. [61]

When you examine the testimony of the defendants you are to consider not only the reasonableness and probability of their story, but you may consider also the fact that they are interested in the result of the case.

There has been considerable testimony as to sales of liquor in April to Mr. Scott, one on the 10th and one on the 29th. Mr. Scott has testified that on those two occasions what he purchased, in his opinion, was intoxicating liquor. The law permits such testimony to be received as to the quality of liquor; you are to consider it for what it is worth. Testimony as to these two sales was introduced on the question of nuisance, not on the other charges, and you are to consider them, if they were made, one on the 10th of April, another on the 29th of April, and also the sale on the 3d of May, in determining whether these defendants were maintaining a place where liquor was kept for sale.

Possession of intoxicating liquor on the 3d of May is charged. If they had possession of the liquor and sold it, there were two offenses; but if it is found that they did not have possession of the liquor on the 3d and still sold it, the finding would be inconsistent; they must have had intoxicating liquor otherwise they could not have sold it; they must have been in possession of intoxicating liquor at the time it was sold, otherwise there could not have been a sale.

There are two forms of verdict prepared in this case. You can find the defendants guilty on one charge, or guilty on two, or guilty on all charges;

or not guilty on one, two or more; or you can find one guilty and the other not guilty, as your judgment dictates. [62]

Thereupon, after the instructions of the Court were read to the jury, the jury retired to deliberate upon their verdict.

BE IT FURTHER REMEMBERED, that thereafter the jury rendered its verdicts in the above-entitled cause, the same being in words and figures as follows, to wit:

In the District Court of the United States in and
for the District of Nevada.

No. 5495.

UNITED STATES

vs.

J. MONTELATICI and A. LAZARRI.

We, the jury in the above-entitled case, find the defendant J. Montelatici, not guilty as charged in the first count of the indictment; not guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,
Foreman. [63]

In the District Court of the United States for the
District of Nevada.

No. 5495.

THE UNITED STATES

vs.

J. MONTELATICI and A. LAZARRI.

We, the jury in the above-entitled case, find the defendant, A. Lazarri, guilty as charged in the first count of the indictment; guilty as charged in the second count; and guilty as charged in the third count.

Dated this 25th day of November, 1922.

H. B. MAXSON,

Foreman.

to which verdicts of the jury, counsel for the defendant J. Montelatici then and there duly excepted.

BE IT FURTHERED REMEMBERED that thereafter the defendant J. Montelatici, by his attorneys of record, in seasonable time, duly filed his motion in arrest of judgment by the defendant J. Montelatici, the same being in words and figures as follows, to wit:

In the District Court of the United States, within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and AMATRADDO LAZ-
ARRI,

Defendants.

MOTION IN ARREST OF JUDGMENT BY J.
MONTELATICI.

Comes now J. Montelatici, one of the defendants
above named and moves the Court to arrest the
judgment and that no judgment be rendered upon
the verdict against him, finding him guilty of main-
taining a nuisance by keeping for sale intoxicating
liquor, upon the following grounds, to wit:

1.

That the verdict is insufficient to support a judg-
ment.

2.

That said verdict is inconsistent and will not sup-
port a judgment, in this; that upon the same trial
and as a part of the verdict rendered by the jury
in the above-entitled cause, the jury returned a
verdict of not guilty as to this defendant, for sales
[64] of liquor and possession of liquor, on the same
date and upon the same transaction upon which a
verdict of guilty of maintaining a nuisance, that of
keeping intoxicating liquor for sale, was based.

All of which is inconsistent with the verdict of maintaining a nuisance rendered by the jury.

3.

That the count of the indictment charging the defendant with maintaining a nuisance, does not state facts sufficient to constitute a public offense, or any offense whatsoever, under the laws of the United States, and is not sufficient in law.

4.

That upon the whole record the judgment is erroneous and should not be rendered.

• FRAME & RAFFETO,

Attorneys for the Defendant J. Montelatici.
which said motion in arrest of judgment having been overruled, the defendant J. Montelatici, by his attorneys, then and there duly excepted.

BE IT FURTHER REMEMBERED that thereafter, and in seasonable time, the defendant J. Montelatici by his attorneys, duly filed his motion for a new trial, the same being in words and figures as follows, to wit:

In the District Court of the United States, Within
and for the District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

MOTION OF J. MONTELATICI FOR A NEW TRIAL.

Comes now J. Montelatici, one of the defendants above named and moves the Court to set aside the verdict of the jury heretofore rendered against him in the above-styled cause, finding him guilty of maintaining a nuisance by keeping intoxicating liquors for sale, upon the following grounds, to wit:

1.

That said verdict is contrary to law.

2.

That said verdict is contrary to the evidence.
[65]

3.

That said verdict is contrary to the law and the evidence.

4.

That said verdict is inconsistent and will not support a judgment in this; that upon the same trial and as a part of the verdict rendered by the jury in the above-entitled cause, the jury returned a verdict of not guilty as to this defendant, for sales of liquor and the possession of liquor, upon the same date and upon the same transaction upon which a verdict of guilty of maintaining a nuisance, that is, keeping intoxicating liquor for sale, was based. All of which is inconsistent with the verdict of guilty of maintaining a nuisance rendered by the jury.

5.

Misdirections of the jury as to matters of law.

6.

Error of the Court in admitting and rejecting testimony.

7.

That the evidence is insufficient to support the verdict.

FRAME & RAFFETTO,

Attorneys for Defendant J. Montelatici.

And thereafter the Court denied the said motion for a new trial, to which ruling the defendant J. Montelatici, by his attorneys, then and there duly excepted.

Thereupon the Court rendered its judgment and sentence upon the said verdict of the jury, as to the defendant Armatraddo Lazzari, on the first day of December, 1922, which judgment and sentence required that the said defendant Lazzari be incarcerated in the Washoe County Jail, Washoe County, State of Nevada, for a period of five months, and assessed a fine of \$350.00 against the said defendant Lazzari, and costs, to which the defendant by his counsel, then and there duly excepted.

And thereupon the Court rendered its judgment and sentence upon the said verdict of the jury, as to the defendant J. Montelatici, on the 12th day of January, 1923, which judgment and sentence [66] required that the said defendant Montelatici be incarcerated in the Washoe County Jail, Washoe County, State of Nevada, for a period of four months and costs, to which the defendant, by his attorneys, then and there duly excepted.

AND BE IT REMEMBERED that subsequently and prior to the sentencing of the said defendant, J. Montelatici, the then attorneys for the defendants in the above-entitled case, withdrew their appearance as attorneys for said defendants, and that Milton M. Detch, Esq., was duly and regularly substituted as the attorney for the defendant, J. Montelatici.

And for as much as the proceedings and the matters of exception above set forth do not fully appear of record, the defendant, J. Montelatici, by his attorney, tenders this bill of exceptions and prays that the same be signed and sealed by the court here, pursuant to the statute in such case made and provided.

Which is done accordingly this 23d day of March, A. D. 1923.

E. S. FARRINGTON,

Judge.

It is hereby stipulated that the foregoing may be settled by the Court as the bill of exceptions herein.

GEORGE SPRINGMEYER,

United States Attorney,

CHAS. A. CANTWELL,

Asst. U. S. Attorney,

Attorneys for the Plaintiff.

MILTON M. DETCH,

Attorney for the Defendant. [67]

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. United States of America, Plaintiff, vs. J. Montelatici and Armatraddo Lazzari, Defendants. Bill

of Exceptions for the Defendant J. Montelatici. Filed March 23, 1923. E. O. Patterson, Clerk. Milton M. Detch, Attorney for Defendant J. Montelatici. [68]

In the District Court of the United States for the
District of Nevada.

No. 5495.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. MONTELATICI and A. LAZZARI,

Defendants.

**Order Extending Time to File Record and Docket
Cause (Dated March 24, 1923).**

Good cause being shown, IT IS ORDERED that the defendant, J. Montelatici, be, and he is hereby, allowed thirty days from and after this day within which to prepare and file record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 24th day of March, 1923.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 5495. In the District Court of the United States for the District of Nevada. The United States vs. J. Montelatici and A. Lazzari. Order Extending Time to File Record on Appeal. Filed March 24, 1923. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [69]

In the District Court of the United States for the
District of Nevada.

No. 5495.

UNITED STATES OF AMERICA

vs.

J. MONTELATICI and A. LAZZARI.

**Certificate of Clerk U. S. District Court to Trans-
cript of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. J. Montelatici and A. Lazzari, Defendants, said case being No. 5495 on the docket of said court.

I further certify that the attached transcript, consisting of 71 typewritten pages numbered from 1 to 71, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto. as the same appears from the originals of record and on file in my office as such

clerk in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$27.35, has been paid to me by Mr. M. M. Detch, attorney for the defendant J. Montelatici in the above-entitled cause. [70]

And I further certify that the original writ of error and the original citation, issued in this cause, are hereto attached.

WITNESS my hand and seal of said United States District Court this 28th day of March, A. D. 1923.

[Seal]

E. O. PATTERSON,

Clerk, U. S. District Court, District of Nevada.

[71]

In the District Court of the United States for the
District of Nevada.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. MONTELATICI and A. LAZARRI,

Defendants.

Writ of Error.

The President of the United States, to the Honorable the Judge of the District Court of the United States in and for the District of Nevada, GREETING:

Because, in the record and proceedings, as also

in the rendition of the judgment of a plea which is in said District Court, before you, between the United States, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants, a manifest error hath happened, to the great damage of the said defendant G. Montelatici, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California within thirty days from date hereof, in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [72] that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 3d day of February, 1923.

[Seal]

E. O. PATTERSON,
Clerk of the United States District Court, District of Nevada.

Allowed by:

E. S. FARRINGTON. [73]

[Endorsed]: No. 5495. Dept. ——. In the District Court of the United States in and for the District of Nevada. United States of America, Plaintiff, vs. G. Montelatici and A. Lazarri, Defendants. Writ of Error. Filed Feb. 3, 1923. E. O. Patterson, Clerk. [74]

In the District Court of the United States in and
for the District of Nevada.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
J. MONTELATICI and A. LAZZARI,
Defendants.

Citation to Writ of Error.

To the United States of America, Defendant in
Error:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, in said Circuit, within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's office of the District of Nevada, wherein J. Montelatici is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. S. FARRINGTON,
U. S. District Judge in and for the District of Ne-
vada, this 3d day of February, 1923.

E. S. FARRINGTON,

Judge of Above-entitled Court.

[Seal]

Attest: E. O. PATTERSON,

Clerk.

I hereby, this —— day of January, 1923, accept
due personal service of the foregoing citation on be-
half of the United States of America, defendant in
error.

Attorney for United States. [75]

[Endorsed]: No. 5495. In the District Court of
the United States in and for the District of Ne-
vada. United States of America, Plaintiff, vs. J.
Montelatici and A. Lazzari, Defendants. Citation
to Writ of Error. Filed Feb. 3, 1923. E. O. Pat-
terson, Clerk. [76]

[Endorsed]: No. 4005. United States Circuit
Court of Appeals for the Ninth Circuit. J. Monte-
latiçi, Plaintiff in Error, vs. The United States of
America, Defendant in Error. Transcript of Rec-

ord. Upon Writ of Error to the United States District Court of the District of Nevada.

Received March 29, 1923.

F. D. MONCKTON,
Clerk.

Filed April 9, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.